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No. 700

IN THE

Supreme Court of the United States

October Term, 1948

VICTOR J. VEATCH,
Petitioner,

vs.

WILLIAM BORTHWICK, Tax Commissioner of the Territory of Hawaii,
Respondent.

BRIEF OF RESPONDENT WILLIAM BORTHWICK, TAX COMMISSIONER OF THE TERRITORY OF HAWAII, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

TABLE OF AUTHORITIES CITED—Continued

Statutes

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OPINIONS BELOW

The opinion of the Supreme Court of Hawaii is reported in volume 38 of Hawaii Reports, page 188. The per curiam opinion of the United States Court of Appeals for the Ninth Circuit is reported in volume 172 of Federal Reporter, Second Series, page 226, case 2.

JURISDICTION

The petition for certiorari seeks review, under section 1254 of Title 28 of the United States Code, of a case which reached the Court of Appeals upon appeal from the Su-

preme Court of Hawaii, under section 1293 of Title 28. The amount in controversy being only $237.35 (R. 15), the case reached the Court of Appeals under that portion of section 1293 which relates to "cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder."

STATEMENT OF THE CASE

This is an action brought by the Tax Commissioner of the Territory of Hawaii for the collection of taxes upon the compensation received by the petitioner during the period October, 1944, to September, 1946, for services performed as an employee of the United States, working and living at Hickam Field, a military reservation within the exterior boundaries of the Territory of Hawaii (R. 12). No tax was imposed by the Territory on any other income petitioner may have, nor does the income so taxed antedate the effective date of either of the federal acts covering this precise situation, to wit, the Public Salary Tax Act of 1939 (53 Stat. 575, c. 59, s. 4, 5 U.S.C.A. 84a), and the Buck Act (54 Stat. 1059, c. 787, approved Oct. 9, 1940, reenacted as sections 105-110 of the new Title 4 of the United States Code by the Act of July 30, 1947, 61 Stat. 641, c. 389).

It was stipulated that petitioner is a domiciliary of the State of Colorado, and that he has paid taxes to that state on the same income, without claiming or receiving any credit on account of his tax liabilities if any, to the Territory of Hawaii (R. 12-13). However, such facts are immaterial, since the Territory of Hawaii has clear taxing jurisdiction over the place where the income was earned.

The Court of Appeals held (R. 66) that the objections made to the tax had been disposed of by its decision in *Yerian v. Territory of Hawaii*, 130 F. 2d 786, decided in 1942, and by section 2 (a) of the Buck Act (4 U.S.C. 106 (a)). Petitioner does not deny that the *Yerian* case was rightly

decided, but seeks to distinguish it on the ground that he lives and works on a military reservation. This aspect of the case is decisively disposed of by the Buck Act, which petitioner seeks to render nugatory. A similar attempt was made in *Kiker v. City of Philadelphia,* 346 Pa. 624, 31 A. 2d 289, in which this Court denied certiorari, 320 U.S. 741.

SUMMARY OF ARGUMENT

The power of the Territory of Hawaii to impose the tax in question is beyond dispute under the Public Salary Tax Act of 1939 and the Buck Act enacted in 1940; and such power existed even in the absence of such statutes.

ARGUMENT

I.

THE POWER OF THE TERRITORY OF HAWAII TO IMPOSE THE TAX IN QUESTION IS BEYOND DISPUTE, UNDER THE PUBLIC SALARY TAX ACT OF 1939, AND THE BUCK ACT ENACTED IN 1940.

Appellant concedes (as he necessarily must) that he is subject to the tax on his compensation received as an employee of the United States, if the Territory of Hawaii had jurisdiction to impose such tax (Br. pp. 12-13). Of course the Territory agrees that jurisdiction to tax is essential.

Jurisdiction to tax the income derived from services may be exercised by the state in which the employee is domiciled, or by the state in which he is employed, or by both. *Shaffer v. Carter,* 252 U.S. 37, 49, *Travis v. Yale & Towne Mfg. Co.,* 252 U.S. 60, 75, *Haavik v. Alaska Packers Assn.,* 263 U.S. 510, *Yerian v. Territory, supra,* supporting the jurisdiction of the state in which the taxpayer is employed; *Lawrence v. State Tax Commission,* 286 U.S. 276, *New York ex rel Cohn v. Graves,* 300 U.S. 308, supporting the jurisdiction of the domiciliary state. That dual taxing jurisdic-

tion may exist as to the same income or other subject of tax, and that such dual jurisdiction may result in double taxation, has been expressly recognized by this Court. *Guaranty Trust Co. v. Virginia,* 305 U.S. 19; *Curry v. McCanless,* 307 U.S. 357, stating as an accepted rule, by way of analogy to the case there in issue, that "income may be taxed both by the state where it is earned and by the state of the recipient's domicile" (p. 368); *Graves v. Elliott,* 307 U.S. 383; *Graves v. Schmidlapp,* 315 U.S. 657, 661; *State Tax Commission v. Aldrich,* 316 U.S. 174; see also *Hughes v. Wisconsin Tax Commission,* 227 Wis. 274, 278 N.W. 403.

When Congress enacted the Public Salary Tax Act of 1939 (5 U.S.C.A. 84a), that statute operated to remove any objection to the taxation of compensation of federal employees based upon the tax immunity of their employer. The legislation originated prior to the decision in *Graves v. People of New York ex rel. O'Keefe,* 306 U.S. 466, which in itself removed the objection.

By the Public Salary Tax Act, Congress left to the appropriate taxing authorities "having jurisdiction to tax", as stated in the Public Salary Tax Act, the matter of state and local taxation of federal salaries. Many states, and also cities, imposing income taxes which made the place where the income was earned the basis of taxing jurisdiction, soon found themselves concerned with the problem of classifying each military or naval reservation of the United States as within or without the state or city limits from the standpoint of legislative jurisdiction. Meanwhile the increasing reliance by the several states, and by many cities, upon sales and use taxes, intensified the problem.[1]

This problem of "enclaves", so called,[2] exists as to military and naval reservations in the several states, as distinguished from the territories. The situation as to territories

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[1] See Committee reports on the Buck Act, Appendix.

[2] *Sanders v. Oklahoma Tax Commission,* 197 Okla. 285, 169 P. 2d 748, cert. denied 329 U.S. 780.

is reviewed in the next point. "Enclaves" exist in the several states under and pursuant to Article I, Sec. 8, Cl. 17 of the Constitution, which prescribes that the Congress shall have power "to exercise exclusive legislation in all cases whatsoever, over such district as may * * * become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; * * *."

Prior to the Buck Act, lands purchased for a military reservation with the consent of a state did not lie within the state's territorial taxing jurisdiction. *Surplus Trading Co. v. Cook,* 281 U.S. 647. However, even before the Buck Act, the states could, and sometimes did, qualify their consent to a purchase by the United States so as to retain taxing jurisdiction. *James v. Dravo Contracting Co.,* 302 U.S. 134; *Silas Mason Co. v. Tax Commission,* 302 U.S. 186.

In instances where Article I, Sec. 8, Cl. 17 did not literally apply complete jurisdiction was retained by states over military reservation lands, such instances being where (a) the reservations were not excepted from the jurisdiction of the state at the time of its admission, but were then in existence and hence not "purchased by the consent of the legislature of the state" within the meaning of the constitutional provision, or (b) the reservations were established on lands of the public domain of the United States, hence not "purchased by the consent of the legislature of the state", or (c) the reservations were acquired by eminent domain or otherwise without the consent of the state legislature. See *Surplus Trading Co. v. Cook, supra,* at pages 650-651 of 281 U.S. But even such retained jurisdiction later might be ceded by the states to the United States, reserving taxing jurisdiction (*Fort Leavenworth R. Co. v. Lowe,* 114 U.S. 525) or not reserving taxing juris-

diction (*Standard Oil Co. v. California*, 291 U.S. 242, *Yellowstone Park Transp. Co. v. Gallatin County*, 31 F. 2d 644 (C.A. 9th 1929, cert. denied 280 U.S. 555) dependent upon the exact terms of the cession by the particular state.

This lack of uniformity and the consequent complexity attendant upon the administration of tax acts with respect to military reservations, led Congress to enact the Buck Act, entitled "An act to permit the States to extend their sales, use, and income taxes to persons residing or carrying on business, or to transactions occurring, in Federal areas, and for other purposes." (54 Stat. 1059, c. 787, approved Oct. 9, 1940, reenacted as sections 105-110 of the new Title 4 of the United States Code by the Act of July 30, 1947, 61 Stat. 641, c. 389.)

The first section of the Act has to do with sales and use taxes. The second section has to do with income taxes and provides that "no person shall be relieved from liability * * * by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area". This section gives "full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area".

By section 6 it is made clear what states are to benefit by the Act. It is there provided (subsection (e)) that:

> "* * * any Federal area, or any part thereof, which is located within the exterior boundaries of any State shall be deemed to be a Federal area located within such State." (Now part of sec. 110 (e) of the new Title 4 of the U. S. Code.)

As this provision is explained in Sen. Rep. No. 1625, 76th Cong., 3d Sess.:

> "Any Federal area, or any part thereof, which is located within the exterior boundaries of any State is deemed to be a Federal Area within such State for

> the purposes of this act. For example, Yellowstone National Park is a Federal area which is located within the exterior boundaries of three States (Wyoming, Montana, and Idaho) and therefore, for the purposes of this act, that part of the Park which falls within the exterior boundaries of Wyoming will be included within Wyoming's taxing jurisdiction, that part which falls within Montana will be included within Montana's taxing jurisdiction, and that part which falls within Idaho will be included within Idaho's taxing jurisdiction."

Section 6 also contains definitions including a Territory in the term "State" (subsection (d)), and including taxes levied on gross income in the term "income tax" (subsection (c)).

Petitioner argues that the Buck Act accomplished nothing. Congress stipulated in section 1 as to sales and use taxes, and in section 2 as to income taxes, that the tax to which Congress consented must be levied by a state, or duly constituted authority therein, "having jurisdiction to levy such a tax". This is construed by petitioner as meaning that the jurisdiction of the state must be sustained independently of all of the provisions of the Act. As to income taxes, petitioner argues that the state must have domiciliary jurisdiction over him. As to sales and use taxes, these being based on territorial jurisdiction alone, it does not appear what independent ground of jurisdiction there could be. Of course it was not the intent of Congress to require that a state or other taxing authority have independent taxing jurisdiction, since that would strip the Act of meaning. The intent of this provision, i.e., "having jurisdiction to levy such a tax", both in section 1 and section 2, was to require that the state or other taxing authority have jurisdiction but for the specific grounds and reasons immediately following which in said sections 1 and 2 are stated not to be objections to tax liability. Thus in section 1 it is required

that the state or other taxing authority have jurisdiction to levy a sales or use tax but for the occurrence of the sale or use, in whole or in part, within a federal area.[3] In section 2 it is required that the state or other taxing authority have jurisdiction to levy an income tax but for the residence of the taxpayer, or the occurrence of the transactions or performance of the services from which the income is received, within a federal area.[4]

In *Bowers v. Oklahoma Tax Commission*, 51 F. Supp. 652 (D.C.W.D., Okla. 1943), the court, after quoting language in section 1 of the Buck Act concerning sales and use taxes, which is identical to that used in section 2 concerning income taxes, said:

"Language could hardly be more explicit."

In *Kiker v. City of Philadelphia, supra*, 346 Pa. 624, 31 A. 2d 289, cert. denied 320 U.S. 741, a case precisely in

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[3] Section 1 reads:

"(a) No person shall be relieved from liability for payment of collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."

(Now Section 105 (a) of the new Title 4 of the U. S. Code.)

[4] Section 2 reads:

"(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such state to the same extent and with the same effect as though such area was not a Federal area."

(Now Section 106 (a) of the new Title 4 of the U. S. Code.)

point upholding the levy of a gross income tax upon the salary of a nonresident derived from services performed in a federal area, the court said of the contention made by petitioner in this case:

> "• • • Such a construction is the equivalent of saying that Congress merely intended to authorize the States to tax persons whom they were already permitted to tax. We cannot permit such an absurd construction to nullify this legislation. • • •"

The Supreme Court of Hawaii said of the Buck Act:

> "It seems clear that the above Act was expressly designed to express the consent of the United States to the levy by the States and Territories of just such a tax as the one here involved against persons residing and employed just as the defendant resides and is employed, and that the Congress had authority to so consent for the United States."
>
> (Rec. 41.)

The present case is a clear one in which certiorari should be denied.

The legislative history of the Buck Act is set forth in the Appendix for the convenience of the Court, should the Court wish to refer to it. The Buck Act has been applied in many cases in addition to those above cited.[5]

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[5] *Sanders v. Oklahoma Tax Commission,* 197 Okla. 285, 169 P. 2d 748, cert. denied 329 U.S. 780 (*supra,* footnote 2), involving use tax on gasoline; *Davis v. Howard,* 306 Ky. 149, 206 S.W. 2d 467 (1947), involving use tax on gasoline and following the *Kiker* case; *Carnegie Illinois Steel Corp. v. Alderson,* 127 W.Va. 807, 34 S.E. 2d 737, cert. denied 326 U.S. 764 (1945), involving occupation tax on manufacture of steel, following the *Kiker* case; *Falls City Brewing Co. v. Reeves,* 40 F. Supp. 35 (D. C. Conn. 1941), upholding taxing jurisdiction in general but holding that United States had not consented to a tax on sales made by a post exchange; *Query v. United States,* 316 U.S. 486 (1942), relating to tax on sales by post exchanges within federal areas.

II.

THE POWER OF THE TERRITORY OF HAWAII TO IMPOSE THE TAX IN QUESTION EXISTED EVEN IN THE ABSENCE OF THE PUBLIC SALARY TAX ACT OF 1939 AND THE BUCK ACT ENACTED IN 1940.

That the states and territories had power to tax federal salaries under the doctrine of *Graves v. O'Keefe, supra,* even in the absence of the Public Salary Tax Act, has been held by this Court, and by the Court of Appeals in the *Yerian* case.

As to the federal areas in the several states, the scope of the taxing jurisdiction might or might not be as wide in the absence of the Buck Act as it is under that act, dependent upon the application of Article I, Sec. 8, Cl. 17 of the Constitution, under the particular circumstances. No uniform rule would exist in the absence of the Buck Act, and to establish uniformity was the very purpose of that Act.

The federal areas in the territories stand on a different footing from those in the several states. The constitutional provision, which refers to states, does not literally apply, and the only question in a territory is what Congress intended in organizing the territorial government. In organizing the government of the Territory of Hawaii, Congress did not except from the jurisdiction thereof any federal reservation (Hawaiian Organic Act, 31 Stat. 141, c. 339, approved April 30, 1900). The Hawaii National Park Act is the only instance of action by Congress excepting land from the Territory's jurisdiction (Act of April 30, 1930, 46 Stat. 227, c. 200, as amended, 16 U.S.C.A. 395). The exercise of the Territory's jurisdiction over federal areas is valid, until and unless disapproved by Congress. *Gromer v. Standard Dredging Company,* 224 U.S. 362, 366, 370-371, citing and approving 26 Ops. Atty. Gen. 91; *Cassels v. Wilder,* 23 Haw. 61; *Territory v. Carter,* 19 Haw. 198;

Reynolds v. People, 1 Colo. 179; *Rice v. Hammond,* 19 Okla. 419, 91 Pac. 698; see also *Surplus Trading Co. v. Cook, supra,* 281 U.S. 647, 652, distinguishing military reservations in the states from those in the territories.

CONCLUSION

The petition for certiorari should be denied.

Dated at Honolulu, Territory of Hawaii, May 7, 1949.

Respectfully submitted,

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APPENDIX

LEGISLATIVE HISTORY OF THE BUCK ACT

Initially the Buck Act was framed "to authorize the levy of State, Territory, and District of Columbia taxes upon, with respect to, or measured by sales, purchases, or use of tangible personal property * * * occurring in United States National Parks, military and other reservations or sites over which the United States government may have jurisdiction".

As so drawn the bill passed the House at the first session of the 76th Congress, and went to the Senate where it was referred to the Committee on Finance. That Committee reported it to the Senate with clarifying changes on July 28, 1939 (Sen. Rep. 1028, 76th Cong., 1st Sess.). The report states:

> "The purpose of the bill is to provide that State sales and use taxes shall apply with respect to transactions in Federal areas in the same manner and to the same extent as with respect to transactions outside such areas. * * * The bill will not affect any right to claim an exemption from such taxes on any ground other than that the Federal Government has exclusive jurisdiction over the area where the transaction occurred."

The report sets forth the report of the Committee on Ways and Means of the House, H. R. Rep. No. 1267, 76th Cong., 1st Sess., to the same effect.

After being so reported by the Senate Finance Committee on July 28, 1939, the bill encountered objections on the floor (see Vol. 84, Cong. Rec. Part 10, pp. 10685 and 10907, with respect to the effect of the bill as to Indian reservations).

It was recommitted to the Committee on Finance, was reported with amendments, and was enacted with these amendments. (Vol. 86, Cong. Rec. Part 11, pp. 12834-5; id., Part 12, p. 12998.) As so reported by the Senate Committee (Sen. Rep. No. 1625, 76th Cong., 3d Sess.):

> "In general, the bill, as amended, proposes to do three things. First, it provides that State sales and use taxes (with certain exceptions which are hereafter explained) shall be applicable with respect to transactions occurring within Federal areas in the same manner and to the same extent as they are applicable with respect to transactions occurring outside such areas and within the State. Second, it provides that State income taxes shall be applicable with respect to persons residing within a federal area or receiving income from transactions occurring or services performed in such area in the same manner and to the same extent as they are applicable with respect to persons residing outside such area or receiving income from transactions occurring or services performed outside such area. Third, it contains certain clarifying amendments to section 10 of the Federal Highway Act of June 16, 1936 * * *"

The report then proceeds with "Detailed Explanation of the Bill", and as to section 2 (now section 106 of Title 4) has this to say:

> "Section 2(a) of the committee amendment removes the exemption from income taxes levied by a State, or any duly constituted taxing authority in a State, where the exemption is based solely on the ground that the taxpayer resides within a Federal area or receives his income from transactions occurring or services performed in such area. One of the reasons for removing the above exemption is because of an inequity which has arisen under the Public Salary Tax Act of 1939. Under that act a State is permitted to tax the compensation of officers and employees of the United States when such officers and employees reside

or are domiciled in that State but is not permitted to tax the compensation of such officers and employees who reside within Federal areas within such State. For example, a naval officer who is ordered to the Naval Academy for duty and is fortunate enough to have quarters assigned to him within the Naval Academy grounds is exempt from the Maryland income tax because the Naval Academy grounds are a Federal area over which the United States has exclusive jurisdiction, but his less fortunate colleague, who is also ordered there for duty and rents a home outside the Academy ground because no quarters are available inside, must pay the Maryland income tax on his Federal salary. Another reason for removing the above exemption is that under the doctrine laid down in James v. Dravo Contracting Co., 1937, 302 U.S. 134 [58 S.Ct. 208, 82 L.Ed. 155, 114 A.L.R. 318], a State may tax the income or receipts from transactions occurring or services performed in an area within the State over which the United States and the State exercise concurrent jurisdiction but may not tax such income or receipts if the transactions occurred or the services were performed in an area within the State over which the United States has exclusive jurisdiction."

Because of the importance attached by counsel for petitioner to section 4 of the bill, now section 108 of the new Title 4 (Br. p. 14), the committee's report on this section is quoted below. Counsel for petitioner apparently construes this section as nullifying all the remainder of the statute. All that it says is that the United States shall not be deemed to have been deprived of exclusive jurisdiction over Federal areas, where theretofore enjoyed, "for the purposes of any other provision of law", that is, laws other than the tax laws to which consent was given by the bill. The committee report says:

"Section 4 of the committee amendment was inserted to make certain that the criminal jurisdiction

of Federal courts with respect to Federal areas over which the United States exercises exclusive jurisdiction would not be affected by permitting the States to levy and collect sales, use, and income taxes within such areas."

The enactment of Title 4 of the United States Code was subsequent to the period involved in this case, and moreover in enacting Title 4 Congress made no change in the Buck Act. As stated in H. R. Rep. No. 252, 80th Cong., 1st Sess., accompanying H. R. Rep. No. 1566, which became the statute enacting Title 4, this House Report being repeated in Sen. Rep. No. 659 of the same session on the same bill, the purpose simply was to enact Title 4 into positive law, without material change. Thus it is stated by the Committee on the Judiciary of the House and repeated by the Senate Committee on the Judiciary:

"This bill is intended to codify and enact into positive law the various provisions of laws now contained in title 4 of the United States Code.

"Under existing law these sections of title 4 of the United States Code are merely prima facie evidence of the law. They are taken from a number of acts and the Revised Statutes and are grouped together and classified for convenience * * *

* * *

"This bill takes each section of title 4 of the United States Code, 1940 edition, as of January 2, 1947, and without any material change enacts each section into positive law. No attempt is made in this bill to make amendments in existing law. That is left to amendatory acts to be introduced after the approval of this bill."